UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, INC., Plaintiff, v. NORMAN Y. MINETA, Secretary, U.S. Department of Transportation, Defendant/ Cross-Claim Defendant, and ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC., Intervenor-Defendant, and RUBBER MANUFACTURERS ASSOCIATION, Intervenor-Defendant/ Cross-Claimant.	Civil Action No. 04-0463 (RJL)

MEMORANDUM IN SUPPORT OF PLAINTIFF PUBLIC CITIZEN'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case arises out of a decision of the National Highway Traffic Safety Administration (NHTSA) to issue regulations declaring several classes of information categorically exempt from disclosure under the Freedom of Information Act (FOIA). NHTSA promulgated the rules even though Congress has never delegated any lawmaking or regulatory authority to the agency under FOIA, NHTSA has routinely released similar data to the public in the past, and the agency never suggested it was contemplating categorical prohibitions on disclosure. Moreover, the agency's rulemaking record falls far short of establishing that all of the information covered by the regulations merits exemption under FOIA. For these reasons, as explained in detail below, the regulations must be vacated.

STATEMENT OF THE ISSUES

1. FOIA does not grant administrative agencies substantive rulemaking authority. NHTSA promulgated rules declaring several classes of information exempt from FOIA. Did NHTSA have authority to make the rules?

2. The Administrative Procedure Act (APA) requires agencies to provide notice and an opportunity to comment on proposed rules. Here, NHTSA proposed to codify existing policy by identifying three types of information as presumptively not exempt from FOIA. But NHTSA's final rules reversed long-standing policy and declared six types of information categorically exempt from FOIA. Did NHTSA give adequate notice and opportunity to comment?

3. No court has held information exempt from FOIA by reasoning that the public might not understand it or that manufacturers might use it illegally. Outside the national security context, no court has held that nonexempt pieces of information may become exempt when viewed as a whole. Was NHTSA wrong to rely on these rationales in creating its new rules?

4. To satisfy Exemption 4 for each piece of information contemplated, NHTSA must show a strong likelihood that disclosure will impair the government's access to information or cause substantial competitive harm. NHTSA's evidence for impairment and competitive harm consists mostly of speculative and conclusory statements by industry groups. Does the record support NHTSA's determination that every piece of information in several classes of early warning data is categorically exempt from disclosure?

BACKGROUND AND PROCEDURAL HISTORY

Automotive manufacturers have a long history of hiding safety defects to avoid the costs of redesign and recall, thereby permitting avoidable injuries and deaths. *See* Attachment A to Supplemental Comments of Public Citizen, NHTSA-2002-12150-42 (providing ten examples of major safety defects covered up by auto manufacturers since the 1960s). NHTSA has a long history of responding lethargically to automotive defects because it has lacked information and failed to use information properly. In 2000, Congress passed legislation to remedy this situation by requiring automotive manufacturers to release more information to NHTSA, requiring NHTSA to watch manufacturers more closely, and empowering the public to monitor both.

A. The Passage of the TREAD Act

In 1996, Ford began receiving a large number of complaints about a serious defect in Firestone's 15-inch ATX, ATX II, and Wilderness tire models, which were designed for Ford Explorers. *See* H. R. Rep. No. 106-954, at 6-7 (2000). In mid-1997, Ford began receiving similar complaints regarding the 16-inch version of the tires sold abroad. *Id*. at 7. Beginning in 1999, Ford and Firestone implemented limited recall actions in the Middle East, Venezuela, Malaysia, and Thailand. *Id*. They did not recall tires in the United States or inform NHTSA of the defect.

In July 1998, a research analyst at State Farm Insurance Company sent NHTSA information on 21 specific tire failures, but the agency did not act on the information. *See* Public Citizen,

Additional Information re: State Farm E-mail to NHTSA from Congressional Hearing Record, NHTSA-2002-12150-41. In 1999, the same analyst notified the agency of 10 more incidents from 1998 and 35 from 1999. *See The Recent Firestone Tire Recall Action, Focusing on the Action as it Pertains to Relevant Ford Vehicles: Hearings Before the Subcomm. on Telecommunications, Trade, and Consumer Protection and the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 106th Cong. 3 (2000) ("*Firestone Hearings*") (statement of Rep. Tauzin, Chair, Subcomm. on Telecommunications, Trade, and Consumer Protection). The agency also received reports of 29 fatalities in 1999 through the Fatal Accident Reporting System (FARS), a database of fatal crashes reported by law enforcement officials. *Id*. at 84.

NHTSA failed to act on any of this information until a local television reporter in Texas uncovered the problems and drew national attention to them. *Id.* at 84-85. Citing 25 complaints, the agency finally opened an initial inquiry in March 2000 and a formal investigation in May 2000. *See* H. R. Rep. No. 106-954, at 7. In August 2000, Firestone agreed to recall all 15-inch ATX and ATX II tires and all Wilderness tires produced at one plant. *Id*.

As Ford's, Firestone's, and NHTSA's conduct came to light, the public and Congress grew outraged. Congress was particularly disturbed by NHTSA's failure to act on the information it had received:

> Steve [Rep. Largent], if you will yield again, I want you to get a picture of our frustration with this system. Here we have an agency that is receiving independently by 1998, by your testimony, about 30 complaints of tire failures, most of them separations leading to serious injuries or accidents, what have you. You have a State Farm report that is filed to your office with another 21 incidents, two fatalities. You have a FARS report coming in from the law enforcement agency saying 29 fatalities. You are getting an awful lot of information. Mr. Largent is pointing out that you are getting a heck of a lot of information that something is terribly wrong out there. People are dying in Ford Explorers outfitted with these Firestone tires. Nothing happens until a station in Houston, Texas, runs an expose on it in 2000.

Firestone Hearings, 106th Cong. 85 (statement of Rep. Tauzin).[1] House members pressed Sue Bailey, NHTSA's acting Administrator, extensively on the agency's failure to alert the public sooner.[2]

On October 11, 2000, Congress passed the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, P.L. 106-414, 114 Stat. 1800 (2000). The TREAD Act requires auto manufacturers to submit "early warning" data to NHTSA from which the agency can detect safety defects, and it imposes civil and criminal penalties for violating the reporting requirements. *See* TREAD Act §§ 3, 5; 49 U.S.C. §§ 30165(a), 30170. In relevant part, the law specifies that early warning data must include (1) claims data submitted to manufacturers regarding serious injury and death; (2) aggregate statistical data on property damage from alleged defects; (3) information on the manufacturers' customer satisfaction campaigns, consumer advisories, recalls, and other repair or replacement programs for defective equipment; and (4) any other data that NHTSA requires to assist it in detecting auto safety defects. *See* TREAD Act § 3; 49 U.S.C. § 30166(m)(3). The Act required NHTSA to establish early warning reporting requirements by June 20, 2002. *See* TREAD Act § 3; 49 U.S.C. § 30166(m)(2).

B. NHTSA's Early Warning Reporting Requirements

In accordance with its statutory mandate, NHTSA established early warning reporting requirements. *See* 49 C.F.R. § 579.1-.29. The agency's regulations require any company that manufactures at least 500 vehicles per year (including light vehicles, *id*. § 579.21, medium-heavy vehicles and buses, *id*. § 579.22, motorcycles, *id*.§ 579.23, or trailers, *id*. § 579.24) to report the

[1]*See also id*. at 3; *id*. at 6 (statement of Rep. Bliley); *id*. at 20 (statement of Rep. Rush); *id*. at 22 (statement of Rep. Wynn); *id*. at 25 (statement of Rep. DeGette); *id*. 26 (statement of Rep. Luther); *id*. (statement of Rep. Wilson); *id*. at 1218 (statement of Rep. Dingell).

[2]*Id.* at 48, 50 (questioning by Rep. Upton); *id*. at 55 (Rep. Oxley); *id*. at 58 (Rep. Gordon); *id*. at 60 (Rep. Sawyer); *id*. at 68-72 (Reps. Burr, Rogan, Tauzin and Wynn); *id*. at 73 (Rep. Luther); *id*. at 79-80 (Rep. Wilson); *id*. at 81 (Rep. Fossella); *id*. at 85 (Reps. Tauzin and Largent); *id*. at 1377-78 (Rep. Sawyer); *id*. at 1390 (Rep. Rush).

following information for the current year and the previous nine years:

- Production numbers. 49 C.F.R. §§ 579.21(a), 579.22(a), 579.23(a), 579.24(a).
- Reports on incidents of death or injury in the United States alleged to have involved safety defects, specifying whether each incident was a fire or rollover and which of numerous coded component systems were involved. *Id*. §§ 579.21(b)(1)-(2), 579.22(b)(1)-(2), 579.23(b)(1)-(2), 579.24(b)(1)-(2).[3]
- The number of property damage claims, consumer complaints, warranty claims, and field reports implicating each coded system. *Id*. §§ 579.21(c), 579.22(c), 579.23(c), 579.24(c).
- Copies of field reports, other than dealer reports, that implicate a potential safety defect in any coded system. *Id*. §§ 579.21(d), 579.22(d), 579.23(d), 579.24(d).

Manufacturers of child restraint systems must also report the above information, but only for the current year and the previous four years. *Id*. § 579.25. Tire manufacturers must provide data for the previous four years on production numbers, deaths and injuries, and warranty claims. *Id*. § 579.26.[4] They must also submit lists of common green tires, *id.* § 579.26(d), which are tires produced to the same specifications that have different external characteristics and are sold under different names. *Id*. § 579.4. Tire manufacturers are not required to submit data on consumer complaints or field reports. *Id*. § 579.26. Finally, manufacturers of fewer than 500 vehicles, manufacturers of original equipment, and manufacturers of replacement equipment other than child restraint systems and tires need only report deaths and identify the system involved in those incidents. *Id*. § 579.27.

[3]The covered systems for light vehicles are steering systems, suspension systems, service brake systems, parking brakes, engines and engine cooling systems, fuel systems, power trains, electrical systems, exterior lights, windshields and windows, air bags, seat belts, structures, latches, vehicle speed controls, tires, wheels, and seats. *Id*. § 579.21(b)(2). Covered systems for medium-heavy vehicles and buses, motorcycles, and trailers are located, respectively, at 49 C.F.R. §§ 579.22(b)(2), 579.23(b)(2), and 579.24(b)(2).

[4]Covered systems for child restraint systems and tires are located at 49 C.F.R. §§ 579.25(b)(2) and 579.26(b)(2).

C. NHTSA's Rulemaking on the Confidentiality of Early Warning Data

On April 30, 2002, NHTSA announced the rulemaking that generated this litigation. The agency proposed to codify its long-standing presumption that three classes of early warning data—consumer complaints, property damage, and warranty claims—do not qualify for FOIA's confidential business information exemption. *See* Notice of Proposed Rulemaking, 67 Fed. Reg. 21,198, 21,199-200 ("NPRM") (discussing proposed amendments to 49 C.F.R. Part 512 ("Part 512")). NHTSA proposed the rule to notify submitters that confidentiality requests for such information are rarely granted, thereby "expedit[ing]" the processing of those requests. *Id*. at 21,200.

Public Citizen and other consumer and safety groups saw little of interest in the NPRM. NHTSA proposed only to codify an established practice of disclosing certain information in accordance with FOIA. NHTSA's adoption, modification, or abandonment of the proposal would have no substantive effect on the agency's disclosure practices. NHTSA admitted as much in the comments accompanying its Final Rule. *See* Final Rule, July 28, 2003, 68 Fed. Reg. 44,209, 44,215 (declaring nonconfidentiality presumptions "unnecessary because all data the agency requires to be submitted is already presumptively subject to disclosure under FOIA").

In contrast, auto manufacturers used the NPRM as an opportunity to argue for rules very different from NHTSA's proposal. They primarily urged NHTSA to rule that the TREAD Act exempts all early warning data from disclosure, in accordance with FOIA Exemption 3. In the alternative, they sought Exemption 4 confidentiality presumptions for various classes of early warning data. Because most of the manufacturers did not submit comments until the last day of the comment period, their arguments did not come to Public Citizen's and other consumer groups' attention until the comment period had ended. Public Citizen then met with NHTSA to ascertain whether the agency was considering the industry's proposals. *See* NHTSA, Memorandum re: Ex

Parte Meeting with Representatives from Public Citizen on October 17, 2002, NHTSA-2002-12150-33. And it submitted late comments. *See* NHTSA-2002-12150-34; NHTSA-2002-12150-35; NHTSA-2002-2150-39; NHTSA-2002-12150-40; NHTSA-2002-12150-41; NHTSA-2002-12150-52.

NHTSA published its final rule on July 28, 2003. *See* Final Rule, 68 Fed. Reg. 44,209. Although NHTSA rejected the argument that the TREAD Act exempts early warning data from FOIA, the agency adopted nearly every other suggestion made by a manufacturer or industry group and even went beyond their requests. Although no commenter explicitly sought categorical confidentiality determinations rather than mere presumptions under Exemption 4, the final rule adds an Appendix C to 49 C.F.R. Part 512, which bars the disclosure of all production numbers other than those for light vehicles, and all data related to warranty claims, field reports, and consumer complaints. And even though no commenter suggested it, NHTSA altered the long-standing Appendix B presumption of confidentiality for blueprints, engineering drawings, future specific model plans, and future production and sales numbers, replacing it with a categorical exemption. NHTSA left only reports of deaths and injuries, data on property damage, and lists of common green tires subject to ordinary FOIA disclosure.

Four consumer advocacy and automotive safety groups, represented by Public Citizen Litigation Group, petitioned for reconsideration. *See* Center for Auto Safety, Advocates for Highway & Auto Safety, Trauma Foundation, & Consumer Federation of America, Petition for Reconsideration, NHTSA-2002-12150-59. They urged reversal of the new rules for four reasons: (1) NHTSA lacked authority to issue substantive FOIA regulations; (2) NHTSA failed to provide notice and comment as required by the APA; (3) NHTSA considered factors inappropriate for an Exemption 4 analysis; and (4) the rules were not based on sufficient evidence. *Id*. At a minimum, the petitioners urged NHTSA to vacate the class determinations and to publish a request for

comment on whether they should be adopted. *Id*. at 3.

The Alliance of Automobile Manufacturers ("Alliance") and the Rubber Manufacturers Association ("RMA") each petitioned for reconsideration as well. The Alliance asked NHTSA to rule confidential under Exemption 6 the last six digits of vehicle identification numbers submitted with fatality and injury reports and the states and countries in which fatalities and injuries occur. *See* Alliance of Automobile Manufacturers, Petition for Reconsideration, NHTSA-2002-12150-58. The RMA urged NHTSA to apply Exemption 3 to all early warning data or, in the alternative, to expand its Exemption 4 determinations to cover the remainder of the early warning data. *See* Rubber Manufacturers Association, Petition for Reconsideration, NHTSA-2002-12150-57.

Public Citizen did not itself petition for reconsideration, and instead filed a complaint in this Court on March 22, 2004, requesting that the Court vacate the Appendix C rules.

NHTSA responded to the reconsideration petitions on April 21, 2004. *See* Final Rule, Response to Petitions for Reconsideration, Correction, 69 Fed. Reg. 21,409. The agency accepted the Alliance's argument for exempting the final six digits of vehicle identification numbers and the RMA's argument for exempting lists of common green tires. It rejected all other arguments. The agency also reversed its Appendix B determination again, reinstating its pre-2002 presumption (rather than categorical determination) of confidentiality for blueprints, engineering drawings, future specific model plans, and future production and sales numbers.

With Public Citizen's consent, the Alliance and the RMA moved to intervene in this action as of right on May 21, 2004, and June 4, 2004, respectively. The RMA cross-claimed against NHTSA, seeking confidentiality of all the early warning data under Exemption 3 or, in the alternative, Exemption 4.

ARGUMENT

When NHTSA published the final Appendix C rules, onlookers could have been forgiven for reacting with astonishment. The rules violate the APA and FOIA, directly undermine the TREAD Act's purpose, contradict NHTSA's proposed rules, reverse long-established agency policy, and are unsupported by the level of evidence required to sustain FOIA exemptions. This Court should vacate the Appendix C rules for four reasons:

5. NHTSA lacked authority to promulgate the rules.

6. Even if NHTSA had authority to promulgate the rules, it failed to provide adequate notice and opportunity to comment as required by the APA.

7. Even if NHTSA had provided notice and comment, the rules are invalid because NHTSA misinterpreted FOIA and considered inappropriate factors.

8. Even if NHTSA's rulemaking were proper in all other respects, the record falls far short of meeting FOIA's high evidentiary burden to prove that each piece of information subject to the rules is exempt from FOIA disclosure.

Summary judgment is appropriate because this case contains pure questions of law and does not depend on the resolution of any factual issues.

I. NHTSA LACKS AUTHORITY TO ISSUE SUBSTANTIVE RULES UNDER FOIA.

FOIA does not grant administrative agencies substantive rulemaking authority. Rather, it grants them authority only to establish fee schedules and compliance procedures, *see* 5 U.S.C. § 552(a)(3)(A), (a)(4)(A)(I), and expressly *forbids* them to create new FOIA exemptions. *See* 5 U.S.C. § 552(d). Because Congress has not granted NHTSA any authority to promulgate substantive rules under FOIA, the agency lacked authority to create categories of exempt records. *See Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C. Cir. 1990) ("An agency's 'power to promulgate legislative regulations is limited to the authority delegated' to it by Congress.") (quoting *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)).

Agency rules that are not "rooted in a grant of such power by the Congress and subject to limitations which that body imposes" are invalid. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *see also Michigan v. EPA*, 268 F. 3d 1075, 1081-82 (D.C. Cir. 2001); *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp*., 132 F.3d 1252, 1254 (8th Cir. 1998) (en banc).

Because Congress has not granted NHTSA substantive rulemaking authority under FOIA, NHTSA has attempted to establish such authority circuitously. In its response to the petition for reconsideration, NHTSA argued that its power to issue the class determinations grows out of its authority to determine whether individual pieces of information are exempt. For support, it cites case law establishing that administrative agencies are generally free to exercise their lawmaking authority either through case-by-case adjudications or through rulemaking, as they deem appropriate. *See* 69 Fed. Reg. at 21,412 (citing *SEC v. Chenery*, 332 U.S. 194 (1947); *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973)).

The problem with NHTSA's argument is that agencies lack authority under FOIA to issue legally binding determinations even for individual pieces of information. Rather, FOIA grants the *courts* exclusive authority to interpret its exemptions and to determine whether agencies have decided particular cases properly. FOIA specifically provides for *de novo* review of agency determinations rather than arbitrary and capricious review, 5 U.S.C. § 552(a)(4)(B), and puts the burden of persuasion on the agencies. *Id*. Courts do not defer to agency interpretations of FOIA because no particular agency is charged with interpreting FOIA and because agencies are not neutral interpreters of FOIA. *See Ass'n of Retired R.R. Workers, Inc. v. U. S. R.R. Retirement Bd.*, 830 F.2d 331, 333-34 (D.C. Cir. 1987). And the courts owe no deference to an agency's FOIA classifications. *Id*. at 334. Because NHTSA has no authority over individual determinations, the agency cannot use that purported power as a bootstrap for the greater authority to exempt broad classes of information.

NHTSA is therefore mistaken to rely on cases stating that agencies have the choice of

making law by adjudication or rulemaking. *See* 69 Fed. Reg. at 21,412 (citing *SEC v. Chenery*, 332 U.S. 194 (1947); *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973)). Those cases concern agencies working to fulfill the mandates of their enabling statutes and exercising lawmaking authority delegated by Congress. They do not authorize NHTSA to act under a statute that grants NHTSA no authority at all—particularly not where the agency is working *against* the relevant statutory mandate by creating exemptions from it.

Aside from its unsupportive case references, NHTSA takes a shotgun approach to justifying its action. It argues that conducting individualized determinations would be burdensome, 69 Fed. Reg. at 21,411; that NHTSA has had a regulation on the books since 1981 declaring that it may issue class determinations, *id.*; that two other agencies have also made class determinations, *id.*; that courts promote the development of categorical rules and recognize that agencies have the "ability" to promulgate regulations necessary for them to perform tasks assigned to them, *id.* at 21,411-12; that the data to be submitted will be standardized and therefore amenable to class treatment, *id.*; [5]that the absence of a categorical rule would disadvantage small businesses, *id.*; that if NHTSA were to tailor early warning reporting to individual FOIA reviews, the early warning program would be "constricted" and "compromised," *id.*; and that NHTSA's processing of individual requests would slow the public's access to nonconfidential data. *Id.*[6]

In light of NHTSA's lack of authority, these arguments are all irrelevant. NHTSA justifies

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[5]Although NHTSA says the data will be standardized, it never squarely argues that there will be *no* nonstandard data. Meanwhile, several industry commenters conceded that some data is nonstandardized and nonexempt. *See, e.g.*, Comments of the Association of International Automotive Manufacturers, July 1, 2002, NHTSA-2002-12150-18, at 9 ("The agency could, by rule, require manufacturers to submit [confidentiality certificates and accompanying information] with the first quarterly reports, and then notify the agency if subsequently reported information differs from the typical information in its class, such as if it has been previously released to the public or if particular information lacks the usual competitive value.").

[6]The latter point is hard to fathom. NHTSA would be free to make information available without request—for example on its website—even if other information were subject to individual requests.

its class determination rule as if it were going about the ordinary business of agency rulemaking. But this is no ordinary rulemaking. Congress has never authorized NHTSA to make a binding rule denying FOIA requests based on what NHTSA believes will be good for small businesses. Likewise, FOIA does not authorize NHTSA or any other agency to avoid FOIA compliance when the agency finds the law burdensome. That NHTSA promulgated a regulation in 1981 proclaiming the agency's ability to issue class determinations, *id.*, and that no member of the public happens to have challenged that regulation, does not mean that FOIA authorized NHTSA's action. Nor does the fact that two other administrative agencies, out of hundreds, have promulgated class determinations render such determinations legal. NHTSA has not pointed to any legal authority approving an agency's issuance of such regulations.

Finally, NHTSA's arguments that the courts encourage the development of categorical rules and permit agencies to promulgate regulations necessary for performing their assigned tasks miss the mark for the same reason. *See id.* at 21,411-12 (citing *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass II*)); *id.* at 21,412 (citing cases). *Critical Mass II* supports the development of general FOIA principles by *courts*, not by agencies. Moreover, it does not suggest that requesters can be bound by mass adjudications made in cases to which they are not parties. Rather, it supports the ordinary process of judicial decisionmaking in which legal principles are developed over the course of individual adjudications. Cases holding that agencies may promulgate rules to carry out their functions are inapposite because they concern agencies acting under broad grants of authority to carry out their statutory mandates. *See, e.g.*, *Fed. Power Comm'n v. Texaco, Inc.*, 377 U.S. 33, 41 (1964) (approving a Federal Power Commission rule promulgated under the Natural Gas Act, which granted the Commission broad "power to prescribe such regulations 'as it may find necessary or appropriate to carry out the provisions of this Act'"). None involves an agency attempting to make substantive

rules under a statute that grants it no authority at all. And none involves an agency attempting to create exemptions from a statute that imposes *obligations* on the agency.

NHTSA's action could stand if FOIA stated that "administrative information shall generally be disclosed, but each agency shall withhold information where it determines that doing so would serve the public interest." Under such a broad grant of authority, the agency would have the choice of proceeding by adjudication or rulemaking, and the courts would review agency determinations deferentially merely to guard against arbitrariness and caprice. But FOIA provides the opposite. It sets out exclusive exemptions and grants courts, not administrative agencies, the authority to interpret its substantive rules and apply them to individual cases. This court should invalidate NHTSA's class exemption regulations without remand to the agency.

This analysis is dispositive of this case and thus should end the Court's inquiry. NHTSA's lack of authority eliminates the need to inquire whether the agency followed proper rulemaking procedures or whether evidence in the administrative record supports its action.

II. NHTSA FAILED TO PROVIDE NOTICE AND AN OPPORTUNITY TO COMMENT.

Even if NHTSA had authority to promulgate the Appendix C rules, it failed to provide adequate notice and opportunity to comment under the APA because the final rules depart so dramatically from NHTSA's proposal that the public effectively had no opportunity to comment on them. *See* 5 U.S.C. § 553.

Naturally, a final rule "need not be identical to the original proposed rule." *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985). However, it must be a "logical outgrowth" of the proposal. *Id*. If a final rule "deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond[.]" *Id*. Agencies engage in one form of excessive deviation when the final rule is the opposite of the proposal. *See Nat'l Black Media Coalition v. FCC*, 791

F.2d 1016, 1022 (2d Cir. 1986). They engage in another when they regulate too far beyond the subject matter of the original proposal. *See Nat'l Mining Ass'n. v. Mine Safety & Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997) (holding that notice and comment was inadequate where "the interested parties could not reasonably have anticipated the final rulemaking from the draft rule") (brackets and quotation marks omitted).

Here, NHTSA has done both. The agency proposed a rule stating that the release of three types of early warning data presumptively does not cause competitive harm, and it explained that the rule would merely provide notice of existing practice. *See* NPRM, 67 Fed. Reg. 21,198, 21,200. But NHTSA's final rule declares nearly all early warning data categorically exempt from FOIA because its release would cause competitive harm and impair NHTSA's ability to collect information. NHTSA did the opposite of what it had proposed—exempting information it had proposed not to exempt—but it also altered the subject matter of its rule in four ways: First, NHTSA proposed only to establish non-binding *presumptions* rather than binding *categorical rules*. Second, it proposed to codify existing practice rather than to reverse existing practice. Third, it mentioned only considering whether the release of information would cause competitive harm, not whether doing so would impair the NHTSA's ability to collect information. Fourth, it extended the scope of its proposal from consumer complaints, warranty claims, and property damage to include production numbers and field reports as well.

Moreover, NHTSA even continued to expand the scope of its categorical exemptions *after the issuance of the final rule*. In response to petitions for reconsideration, NTHSA ruled exempt from FOIA disclosure common green tires and portions of Vehicle Identification Numbers (VINs).

These actions amount to the very opposite of notice and opportunity to comment: a bait-and-switch. NHTSA's proposal stated that it "consistently denies" confidentiality requests for data regarding property damage, consumer complaints, and warranty claims. 67 Fed. Reg. at 21,200.

The proposed presumptive rule favoring disclosure was merely meant to expedite FOIA compliance by alerting submitters that requesting confidentiality for such data is rarely fruitful:

> The agency frequently receives requests for confidential treatment for these types of materials, and consistently denies such requests. The agency is proposing to establish these class determinations to document its current practice, which is based on applicable case law. It is the agency's hope that these class determinations would serve to inform submitters of information about the types of materials likely to be granted or not granted confidential treatment, and that this might expedite the processing of requests for confidential treatment that are submitted to the agency.

67 Fed. Reg. at 21,200. Because the proposal would only "document [NHTSA's] current practice," NHTSA was proposing *no substantive change at all*. As NHTSA later admitted, failure to implement the proposal would not have altered the agency's routine compliance with FOIA. *See* 68 Fed. Reg. at 44,215 (stating that the presumptions of nonconfidentiality in the proposed rule "are unnecessary because all data the agency requires to be submitted is already presumptively subject to disclosure under FOIA"); *see also Stuart-James Co., Inc. v. SEC*, 857 F.2d 796, 800-01 (D.C. Cir. 1988) (holding that "general statements of policy" merely explaining what the law already provides are not substantive rules).

Thus, the proposed rule served to lull and ward off anyone concerned with disclosure of early warning data, and such parties had no meaningful opportunity to comment on the final rules. *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (agencies must "provide sufficient detail and rationale for the rule to permit interested parties to comment meaningfully"); *id*. (explicitly rejecting "the notion that a reference to a specific topic [here, presumptions against exemption] can give rise to notice of the existence of a more general topic [here, exemptions in general] and that the general topic, in turn, can encompass notice of a second specific topic [here, binding exemptions] only remotely related to the first specific one").

In its denial of the consumer groups' petition for reconsideration, NHTSA attempted to answer these charges in two ways. NHTSA first argued that the public had adequate notice that the

agency might pass categorical exemptions because the agency had solicited comments on whether it should make other class determinations in addition to those in the proposal. *See* 69 Fed. Reg. at 21,413. The argument fails. NHTSA sought comments only on the advisability of establishing non-binding *presumptions*, not on categorical rules. *Id*. Moreover, NHTSA itself suggested that it would provide an additional comment period "if necessary." *Id*. Presumably, that meant NHTSA would open an additional comment period before adopting major substantive changes to the rules, as the law requires. *See American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (holding that notice and comment was inadequate where "a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule"); *see also Nat'l Mining Ass'n*, 116 F.3d at 531. But NHTSA did no such thing. Finally, and most important, the courts have explicitly rejected this type of catch-all notice:

> The FCC now attempts to defend its notice by contending that interested parties were invited to submit other proposals and that the Notice stated that the rules governing the use of the fourteen AM channels would be promulgated substantially as proposed in this Notice of Proposed Rule Making or in accordance with such variants, modifications, or alternatives within the scope of the issues of this proceeding, as [the Commission] may find preferable after considering the entire record. . . . If this were enough notification of [intention to adopt drop the proposal], an agency could simply propose a rule and state that it might change that rule without alerting any of the affected parties to the scope of the contemplated change, or its potential impact and rationale, or any other alternatives under consideration. As one court has pointed out: unfairness results unless persons are sufficiently alerted to likely alternatives so that they know whether their interests are at stake.

Nat'l Black Media Coalition, 791 F.2d at 1022-23 (citations and internal quotation marks omitted).

NHTSA's second response is that Public Citizen and "other interested members of the public" must have been provided adequate notice because Public Citizen argued against class exemptions in its comments. 69 Fed. Reg. at 21,413. This argument also fails. Public Citizen addressed the issue only because it monitored the docket carefully and noticed that *other* commenters had proposed class exemptions. *See* NHTSA-2002-12150-34, at 12 (responding

specifically to comments by the Alliance of Auto Manufacturers). The D.C. Circuit has long held that notice from other commenters is inadequate. *See AFL-CIO*, 757 F.2d at 340 ("As a general rule, [an agency] must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.") (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir.1983) (brackets in original)); *see also Fertilizer Inst.*, 935 F.2d at 1312 ("The fact that some commenters actually submitted comments suggesting the [rule adopted] is of little significance. Commenting parties cannot be expected to monitor all other comments submitted to an agency.").

The D.C. Circuit has also rejected the assumption that if one group decided to comment on an issue, all interested parties must have had adequate notice. *See AFL-CIO*, 757 F.2d at 340 n.5 (citing *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1019 (3d Cir. 1972) ("The fact that some knowledgeable manufacturers . . . responded [] is not relevant. Others possibly not so knowledgeable were interested persons within the meaning of 5 U.S.C. § 553."). Finally, even though Public Citizen submitted comments, it can easily demonstrate that the lack of notice prejudiced it. *See, e.g.*, *Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (finding inadequate notice prejudicial where an interested party made a "colorable claim that it would have more thoroughly presented its arguments" had it known what the agency was contemplating). Not only did Public Citizen have to submit its comments hastily, after the comment period had ended; it also missed the opportunity to advance its first argument in this litigation—that NHTSA lacked authority to issue categorical exemptions—because even then it had no warning that NHTSA would attempt to regulate so brazenly beyond the scope of its authority.

The consumer groups' filing of a petition for reconsideration does not cure the lack of notice and opportunity to comment. The D.C. Circuit long ago rejected the claim that the ability to comment on a rule after it is promulgated remedies a denial of the opportunity to have participated

in the rulemaking:

> Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas. Other courts have recognized this difference and rejected arguments similar to that asserted here:
>
> > Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way. . . . We doubt that persons would bother to submit their views or that the Secretary would seriously consider their suggestions after the regulations are a fait accompli.
>
> . . . Were we to allow the EPA to prevail on this point we would make the provisions of § 553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.

New Jersey v. EPA, 626 F.2d 1038, 1049 (D.C. Cir. 1980) (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 214-15 (5th Cir. 1979)); *see also Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982) ("That EPA allowed petitions for reconsideration is not an adequate substitute for an opportunity for notice and comment prior to promulgation.").

To illustrate the inadequacy of NHTSA's notice, imagine the following: A city council notifies Jane that it plans to pass a resolution stating that the council routinely rejects new highway construction near her home. The council explains that the rule is intended to save paper by diminishing the volume of fruitless construction proposals. However, the council seeks comments on its proposal and on whether it should consider any other proposals related to highway construction. Because Jane is pleased with the resolution as contemplated but sees no threat to her interests if it fails, she does not bother attending hearings. Later, Jane learns that the council has resolved to build a highway abutting her backyard and an on-ramp that passes over her small business across town. She petitions in protest, but to no avail. The council argues that Jane had adequate notice and opportunity to be heard because it informed her that it sought additional

proposals related to road construction, because Jane's neighbor, Bill, attended the hearing and commented on the new proposal, and because Jane had the opportunity to ask the council to change its mind.

No court in the United States would hold that Jane had adequate notice and an opportunity to comment. NHTSA would so hold; but NHTSA is wrong. This Court should vacate the Appendix C rules because they depart dramatically from NHTSA's original proposal.

III. NHTSA CONSIDERED FACTORS THAT ARE IMPROPER UNDER FOIA EXEMPTION 4.

Even if NHSTA had the authority to issue substantive rules under FOIA and had followed required rulemaking procedures, its rule would be invalid because the agency misinterpreted Exemption 4 and relied on improper, novel considerations. First, NHTSA based its exemptions in part on the suspicion that consumers might not understand the early warning data. Second, NHTSA relied on the speculation that competitors might use the data to engage in advertising. Third, NHTSA conceded that although most of the early warning data is not competitively harmful when viewed individually, it is exempt from disclosure because it could cause competitive harm when viewed collectively. FOIA does not permit any of these considerations.

A. FOIA Does Not Exempt Information on the Basis of Speculation that the Public May Not Understand It.

NHTSA erred first by exempting the early warning data because consumers might not understand it. *See* 68 Fed. Reg. at 44,222-23; 69 Fed. Reg. at 21,420. Setting aside NHTSA's failure to offer proof of the assertion, the argument fails because it contradicts FOIA's entire purpose. Not surprisingly, NHTSA cannot find any support in the case law. FOIA broadly mandates disclosure of all government information so that the public may monitor government activity. *See, e.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry . . . needed to check against corruption and to

hold the governors accountable to the governed."); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (noting the "congressional objective . . . to open agency action to the light of public scrutiny"). NHTSA's argument that the public should be kept ignorant of information whenever an administrative agency believes that only the agency and certain industry groups can understand it is a breathtaking subversion of FOIA's fundamental purpose.

For support, NHTSA cites only a footnote containing no legal holding from an opinion written 24 years ago. *See* 68 Fed. Reg. at 44,220 & n.13 (citing *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 52 n.43 (D.C. Cir. 1981)); 69 Fed. Reg. at 21,420 (citing same). The footnote stated, in response to one party's argument, that the lower court should consider on remand the "factual" question whether consumers or competitors could misuse certain information. *Worthington*, 662 F.3d at 53 n.43. The court did not hold that consumer misuse constitutes competitive harm under Exemption 4. If the lower court had found that the information was susceptible to such use as a factual matter, then perhaps the court of appeals would have considered that question. But the case did not present the question, and it was never decided. In the 24 years that have followed, no court has adopted NHTSA's theory.

B. FOIA Does Not Exempt Information on the Basis of Speculation That Competitors May Use It in Advertising.

NHTSA also erred by basing its exemptions in part on the speculation that manufacturers would use the early warning data to engage in unfair and misleading advertising. *See* 68 Fed. Reg. at 44,222 (discussing Cooper Tire's and other commenters' concerns to that effect); *id*. at 44,224 ("Competitors (and others) may also use the field report information competitively, just as with warranty data, to suggest comparisons that may merely result from differing policies and practices."). Numerous state and federal laws prohibit deceptive advertising, and NHTSA failed to explain why manufacturers would ignore those laws. Indeed, in its denial of the petition for

reconsideration, NHTSA disavowed ever having used this rationale. 69 Fed. Reg. at 21,420 ("We did not base [our decision] on misleading and unlawful product disparagement by competitors.").

However, even if NHTSA did not rely on the possibility of *deceptive* advertising, it clearly relied on the assumption that *some* form of comparative advertising would cause competitive harm. *See* 68 Fed. Reg. at 44,222, 44,224. But comparative advertising is no basis for competitive harm under FOIA. Not all injury to competitive position is a "competitive harm" under FOIA. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 n.16 (D.C. Cir. 1983). Competitive injuries resulting from "'customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, . . . violations of civil rights, environmental or safety laws'" do not justify exemption. *Id*. (quoting Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 Wis. L. Rev. 207, 235-236); *accord CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987); *Public Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 415 & n.2 (D.D.C. 1997). Although information showing that a product may be unsafe or inferior could harm a business's reputation and the sales of its product, the information does not give an *unfair* competitive advantage to rivals. *See* Comments of General Motors Corporation, June 28, 2002, NHTSA–2002-12150-12, at 3 (acknowledging that "legitimate competitive disadvantage brought to the consumers' attention by truthful, substantiated comparative claims in advertising is not the type of competitive harm that is considered in the context of Exemption 4.").

C. FOIA Does Not Permit Consideration of Aggregated Information.

FOIA requires disclosure of all nonexempt government information. If a single record contains both exempt and nonexempt information, FOIA provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt[.]" 5 U.S.C. § 552(b). The courts vigorously enforce this mandate,

requiring "adversary testing" of each piece of requested information and the segregation and disclosure of every bit possible. *See Vaughn v. Rosen*, 484 F.2d 820, 826-29 (D.C. Cir. 1973).

Against this settled law, NHTSA advances a novel theory of confidentiality. Although the agency concedes that it has previously released much of the data at issue in this litigation as a matter of course, *see, e.g.*, 67 Fed. Reg. at 21,200, it argues that the early warning data is competitively harmful when viewed collectively, and that the potential for such harm prohibits the release of any single piece of data that is part of the whole.

NHTSA's argument, termed a "mosaic" theory of disclosure harm, is a narrow exception to FOIA created only for requests that implicate national security concerns. For example, when public interest groups sought the names of individuals detained in the course of the government's investigation of the September 11 attacks, the court assented to the Justice Department's claim that release of a comprehensive list of names of detainees would provide too much information to terrorists. *See Center for Nat'l Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 926-29 (D.C. Cir. 2003). However, the court accepted the argument only because it was deferring heavily to the executive branch on national security concerns. *Id*. (mentioning "deference to the executive" on national security seven times); *id*. at 928 ("[C]ourts have relied on similar mosaic arguments *in the context of national security*. . . . In *Sims*, for example, the Supreme Court cautioned that bits and pieces of data may aid in piecing together bits of other information even when the individual piece is not of obvious importance in itself.") (citing *CIA v. Sims*, 471 U.S. 159, 178 (1985) (quoting *Halperin v. CIA*, 629 F.2d 144, 150 (D.C. Cir.1980))) (emphasis added; internal quotation marks omitted). NHTSA provides no justification for extending the mosaic theory to Exemption 4.

In addition to *Center for National Security Studies*, NHTSA cites one customs case, *Trans-Pacific Policing Agreement v. U.S. Customs Service*, 177 F.3d 1022 (D.C. Cir. 1999). *See* 69 Fed. Reg. at 21,415. But that case is inapposite and, in any event, did not produce the holding

for which NHTSA cites it. Unlike this case or *Center for National Security* studies, no one in *Trans-Pacific* urged the court to exempt a broad class of documents from disclosure based on the speculation that people might be able to piece them together to deduce something harmful. Rather, incontrovertible evidence in *Trans-Pacific* demonstrated that just two pieces of information—two distinct codes regarding a shipment of goods—would be linked in a manner that would clearly cause serious competitive harm. *Id*. at 1026. More important, even that proposition was *dicta*. Trans-Pacific had determined that it would be satisfied with a redacted form of information that the defendant did not argue was competitively harmful. *Id*. at 1026-27. But Trans-Pacific had neglected to seek redaction or segregation in the district court. Therefore, the court of appeals only considered whether it should require Trans-Pacific to file a new FOIA request or remand to the district court to consider segregability. *Id*. Neither party argued about competitive harm, and the court did not seriously consider the issue, much less decide it. *Id*.

Finally, *Trans-Pacific* is inapposite because release of the information at issue there would not have served FOIA's purposes. *See Trans-Pacific Policing Agreement v. U.S. Customs Serv.*, 1998 WL 34016806, at *5 (D.D.C. May 14, 1998) ("The withholding of HTS numbers under these circumstances does nothing to impair the purposes of the FOIA statute."). Even if the court had endorsed a "mosaic theory" in that case, it is unlikely the court would reach the same result in a case such as this one, where release of the disputed information would directly advance FOIA's purpose by enabling the public to monitor a government agency's implementation of a statute passed to remedy the agency's failures. *See* U.S. Department of Transportation, Office of the Inspector General, Follow-Up Audit of the Office of Defects Investigation, National Highway Traffic Safety Administration, Report No. MH-2004-088, at 3 (Sept. 23, 2002) (expressing concern that the absence of public oversight of NHTSA's use of the early warning data may frustrate the purpose of the TREAD Act).

This Court should vacate the Appendix C rules because NHTSA relied on legal theories that have no place in Exemption 4 analysis.

IV. THE EVIDENCE DOES NOT SUPPORT, AND OFTEN WEIGHS AGAINST, CATEGORICAL TREATMENT.

Even if one accepts NHTSA's novel legal theories under Exemption 4, the agency has failed to muster evidence sufficient to establish class exemptions. Commercial information is exempt from FOIA when its disclosure would (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom it was obtained. *See Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Critical Mass II*, 975 F.2d at 878. The burden is on NHTSA to prove that an exemption applies, and the agency must provide "detailed analysis." *Vaughn*, 484 F.2d at 826-27. NHTSA may not attempt to justify exemption using conclusory generalizations or speculation, and it may not shift the burden on requesters to prove the *absence* of competitive harm. *See id*. at 826-28.

NHTSA's attempt to render FOIA determinations through rulemaking procedures does not relieve it of its burden of persuasion on the applicability of exemptions. To be sure, the courts grant great deference to ordinary agency rulemakings, requiring even less than a preponderance of the evidence to justify agency decisions. *See, e.g.*, *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 365-66 (D.C. Cir. 2003). Ordinary arbitrary and capricious review requires only a "rational connection between the facts found and the choice made." *Sioux Valley Rural Television, Inc. v. FCC*, 349 F.3d 667, 674 (D.C. Cir. 2003). Here, however, NHTSA's exemption rules are entitled to no deference because FOIA provides for *de novo* review of FOIA determinations. *See* 5 U.S.C. § 552(a)(4)(B). The agency cannot expand its ability to withhold information by proceeding via rulemaking rather than individual FOIA requests.

That NHTSA proceeded through ordinary rulemaking illuminates the reason for the agency's

poor evidentiary showing: Rather than attempting to meet the high evidentiary required to justify a FOIA exemption, NHTSA appears only to have sought to create a "rational connection" between the facts and its rules, without concern for whether the rules were even supported by a preponderance of the evidence. The resulting record is plainly insufficient under FOIA.

A. NHTSA Failed to Prove That Releasing the Early Warning Data Would Impair NHTSA's Ability to Collect Data.

NHTSA has failed to demonstrate that disclosing data regarding warranty claims, consumer complaints, and field reports would impair its ability to collect necessary information. Rather than providing evidence, NHTSA simply relies on conclusory assertions from industry groups stating that, if the agency discloses the early warranty data, manufacturers may alter their business practices to reduce the volume and quality of such information. For example, manufacturers assert that they may collect fewer field reports or scale back offers to repair or replace parts no longer under warranty to avoid the appearance of having lower quality products. NHTSA's citation of such claims falls far short of meeting its evidentiary burden for several reasons.

1. NHTSA Failed to Make a Detailed Showing of Significant Impairment.

First, FOIA requires a highly detailed showing of impairment that agencies rarely meet. Claims of impairment are "inherently weak where, as here, the agency has secured the information under compulsion." *Niagara Mohawk Power Corp. v. U.S. Dept. of Energy*, 169 F.3d 16, 18 (D.C. Cir. 1999). Conclusory and generalized assertions are particularly insufficient to demonstrate that disclosure will impair access when private parties are *required* to submit information to the government. *Id*. at 19. An agency seeking exemption must provide a "'detailed justification [of] the extent to which disclosure . . . will impair the government's ability to obtain necessary information[, supported by] specific factual or evidentiary material.'" *Critical Mass Energy Project v. NRC*, 830 F.2d 278, 283 (D.C. Cir. 1987) ("*Critical Mass I*") (quoting *Pacific Architects &*

Engineers Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C. Cir. 1974)). The agency's justification must include a detailed inquiry into the manner in which the private submitter collects information, the manner in which it is circulated, and whether those who compile the information are sensitive to its disclosure. *See Pacific Architects*, 505 F.2d at 385; *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 946-47 (D.C. Cir. 1991), *vacated on other grounds*, 975 F.2d 871 (D.C. Cir. 1992) (en banc). And to justify withholding information, the impairment must be significant. *See Critical Mass I*, 830 F.2d at 286; *Pacific Architects*, 505 F.2d at 385. Finally, the agency must show the precise extent of the impairment because no more information may be exempted than necessary. *See Washington Post Co. v. HHS,* 690 F.2d 252, 269 (D.C. Cir. 1982) (remanding case for the district court to make findings on the extent to which the government's ability to obtain information would be impaired by disclosure). NHTSA did not even attempt to meet these requirements.

Rather, NHTSA relied nearly exclusively on the kind of conclusory evidence that the law rejects—generalized speculation and conclusions offered by submitters of information. *See* 69 Fed. Reg. at 21,421 ("[W]e agree with the manufacturers that publication of the EWR data would give some manufacturers 'black eyes' and that to a notable degree it is likely they would alleviate this problem, and improve sales and profits, by limiting warranty coverage, including good will payments."). The courts have consistently found such evidence inadequate to sustain an Exemption 4 claim. *See Niagara Mohawk*, 169 F.3d at 18; *Critical Mass II*, 931 F.2d at 947; *Critical Mass I*, 830 F.2d at 284 (agency assertion inadequate where it lacks "clear focus and solid factual support"); *Washington Post*, 690 F.2d at 269. Reliance on industry assertions is particularly unwarranted where industry has a strong motive to resist public release of information bearing on the safety of its products, rendering especially self-serving the industry's predictions about its own behavior if disclosure is required.

Moreover, NHTSA stretches the industry's statements well beyond their scope. NHTSA

relies exclusively on comments submitted by the Alliance of Auto Manufacturers ("Alliance"), the Tire Industry Association ("TIA"), the Association of International Automotive Manufacturers ("AIAM") and Workhorse. *See* 69 Fed. Reg. at 21,421. However, even those remarks demonstrably fail to support NHTSA's broad impairment determination:

- The Alliance's comments do not even discuss impairment with respect to consumer complaints, field reports, or warranty claims. *See* Comments of the Alliance, August 26, 2003, NHTSA-2002-12150-29.

- TIA's comments are conclusory, speculative, and would apply generally to all data submitted to the government. They have no specific bearing on any class of early warning data, or early warning data as a whole: "[I]f all of the information is disclosed, these entities will produce the bare minimum required. If, on the other hand, they know the information will be kept confidential, or even if they are allowed to request confidentiality, they will be more likely to provide robust amounts of data." Comments of TIA, NHTSA-2002-12150-13, at 6.

- AIAM's comments mention impairment only with respect to field reports, not consumer complaints or warranty claims data. And AIAM offers only a hypothetical musing about the consequences "if" NHTSA's ability to collect information is impaired. It provides no evidence that disclosure will cause impairment:

  > It is in the best interests of NHTSA and the vehicle manufacturers that field reports contain full, frank, and open statements and views from technical staff. *If* the fear of publicity compromises the quality and reliability of the information in the field reports, it will be to the detriment of the safety programs of both NHTSA and the manufacturers.

  Comments of AIAM, July 2, 2002, NHTSA-2002-12150-18, at 6 (emphasis added).

- Workhorse also discusses only field reports, and its comments are speculative on their face. *See* Comments of Workhorse, July 3, 2002, NHTSA-2002-12150-20, at 3 ("Workhorse is concerned that a policy of customarily publicly disclosing field reports *might* reduce the accuracy of such reports, as fleet owners *may*, for competitive reasons, limit what they say in those reports.") (emphasis added).

Remarkably, NHTSA determined that disclosure of any data related to warranty claims, field reports, and consumer complaints would significantly impair NHTSA's ability to collect such information on the basis of the above comments and no other record evidence. *See* 69 Fed. Reg. at 21,421 (discussing warranty data and citing comments of the Alliance, TIA, AIAM, and

Workhorse), *id*. at 21,422 (discussing field reports without citing further evidence, and referring to the evidence on warranty data); *id*. at 21,423 (discussing consumer complaints without citing further evidence, and referring to the evidence on warranty data).

2. NHTSA Failed to Prove That Other Factors Will Not Counterbalance the Potential Impairment.

Second, NHTSA failed to prove that other factors will not counterbalance the impairment it fears. Most of the early warning data is too important for manufacturers to quit collecting it merely because they would have to disclose abstract reports on it.

For example, NHTSA provides no explanation of how manufacturers can avoid receiving consumer complaints. But even if they could, NHTSA cites no evidence showing that manufacturers would forgo a wealth of direct consumer feedback merely because they would have to turn over a *count* of complaints to the public. Common sense suggests that consumer feedback is far too important to quit collecting it on the basis of such superficial disclosures. The same is true of field reports. NHTSA fails to explain why companies will quit listening to valuable information from their own employees merely because the company has to provide a count of such internal reports—or even if the company must disclose the full reports. Again, the information is likely far too useful for companies to quit collecting it. *See, e.g.*, *Center for Public Integrity v. Dep't of Energy*, 191 F. Supp. 2d 187, 196 (D.D.C. 2002) (benefits of securing government contracts ensured that contractors would not cease bidding for government contracts if the government released bid amounts); *Chicago Tribune Co. v. Department of Health and Human Services*, 1997 WL 1137641, *21 (N.D. Ill. 1997) (rejecting claim that disclosure will have a "chilling effect" on scientific reports); *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 (9th Cir. 1992) ("Organizations have many incentives to conduct [safety] reviews that outweigh the harm that might result from disclosure.").

A similar argument applies to warranty claim information. Numerous factors bear on the scope and nature of a company's warranty offerings, including intense competitive pressure to offer good service. *See* Articles on Automotive Warranty Competition, Attachment 4 to Petition for Reconsideration, NHTSA-2002-12150-59. NHTSA provides no evidence that disclosing the mere number of warranty claims paid will counteract all other pressures on manufacturers to provide good warranty programs. In fact, NHTSA itself cites evidence suggesting that market pressures will *prevent* manufacturers from scaling back warranty programs and only claims that FOIA disclosure "may" deter goodwill programs. *See* 68 Fed. Reg. at 44,223. Speculation about what "may" happen in the face of contrary evidence is patently insufficient to justify FOIA exemption.

Finally, NHTSA's arguments that manufacturers may charge their field reporting practices or warranty terms have no place in Exemption 4 analysis. The impairment inquiry concerns whether disclosure will hamper government efforts to collect information, not whether disclosure will influence manufacturers' substantive business practices. NHTSA cites no precedent for considering the impact of disclosure on private business practices.

3. NHTSA Failed to Show That the Likelihood of Impairment Outweighs the Public Interest in Disclosure.

Third, NHTSA failed to engage in "a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure." *Washington Post*, 690 F.2d at 269; *accord Washington Post Co. v. HHS*, 865 F.2d 320, 326-27 (D.C. Cir. 1989) (on remand, district court must balance if impairment is shown). Instead of balancing, NHTSA simply declared that the early warning data is not useful to the public because it does not reveal specific safety defect information. *See* 69 Fed. Reg. at 21,421 ("Standing alone, the EWR warranty data simply provide numbers of warranty claims payments. They do not identify a particular part or problem."); *id*. at 21,422 ("Standing alone, the EWR field report numbers simply indicate that there was a reported

problem, by system, or component."); *id*. at 21,423 ("Standing alone, [the consumer complaint data] simply indicate consumer dissatisfaction or perception of a potential or actual defect, by system or component.").

By framing the public interest in that manner, NHTSA ignores the real public interest in FOIA disclosure: monitoring "what the government is up to." *Public Citizen Health Research Group v. FDA*, 185 F.3d 898 (D.C. Cir. 1999) (brackets omitted). NHTSA attempts to pin requesters' interest to a particular purpose (learning about auto safety) that is not FOIA's central concern: "[W]hether disclosure of a . . . document . . . is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny . . . rather than on the particular purpose for which the document is being requested." *Id*. By failing even to consider the public's interest in monitoring what NHTSA is "up to," the agency side-stepped the balancing analysis entirely. As illustrated by the congressional outrage that precipitated the TREAD Act, the public has a strong interest in obtaining early warning data so that it can monitor whether NHTSA is doing its job of monitoring and investigating significant safety issues.

B. NHTSA Failed to Prove That Releasing the Early Warning Data Would Cause Competitive Harm.

The record does not sustain NHTSA's burden of showing that the categories of exempt information would cause competitive harm if released. First, NHTSA has not even *attempted* to prove that *every* piece of early warning data would cause competitive harm, and the record evidence does not support such a determination. Second, NHTSA has failed to show that the early warning data will cause competitive harm, even if considered in the aggregate. Third, to the extent that NHTSA cites specific evidence, the evidence frequently consists of no more than conclusory statements by industry and often does not support NHTSA's positions. Fourth, even if NHTSA's

novel legal theories of competitive harm were valid, NHTSA has failed to prove harm within the scope of those theories. Fifth, NHTSA has failed to prove that the nonexempt portions of the data cannot be segregated and has not considered whether withholding some of the data would reduce the competitive value of other data.

1. NHTSA Has Not Even Attempted to Show That the Release of *Any* of the Exempted Information Would Cause Competitive Harm.

NHTSA has ruled on information that it has not yet received. Therefore, to justify its determination, NHTSA must show that all reports and all data to be submitted will satisfy each element of Exemption 4. NHTSA has not come close to proving that all of the data currently in its possession is exempt, much less that all future data would be. To show that the release of data would be likely to cause competitive harm in every case, NHTSA must demonstrate that all early warning data in the exempt categories relates to areas in which there is actual competition in the industry and that the information is otherwise unavailable to competitors at reasonable cost. *See Greenberg v. FDA*, 803 F.2d 1213, 1217-18 (D.C. Cir. 1986); *Niagara Mohawk*, 169 F.3d at 19. To carry its burden, it must make this showing (a) as to all information going back over the past ten years, (b) with respect to each of the 22 components or systems subject to disclosure, and (c) for every model of vehicle, child safety restraint, and tire subject to the reporting requirement.

NHTSA does not even attempt to provide such evidence. Meanwhile, manufacturers presumed that at least some of the exempt data would *not* be confidential. *See, e.g.*, Comments of AIAM, July 1, 2002, NHTSA-2002-12150-18, at 9 ("The agency could, by rule, require manufacturers to submit [confidentiality certificates and accompanying information] with the first quarterly reports, and then notify the agency if subsequently reported information differs from the typical information in its class, such as if it has been previously released to the public or if particular information lacks the usual competitive value."). Likewise, industry groups suggested that some

of the early warning data, or similar information, is already available to competitors at little cost. For example, in an attempt to show the competitive value of early warning data, the Alliance cited two industry publications that contain some of the early warning (or similar) data and which are available for just $495 and $50 each. *See* Comments of the Alliance, July 1, 2002, NHTSA-2002-12150-10, at 9 (citing MEMA/OESA, Automotive Industry Status Report 2001 (November 2001); MEMA/OESA, Replacement Rates of U.S. Automotive Parts (2001)).[7] The record contains no evidence that NHTSA examined these sources or even entertained the question whether they demonstrate that some of the early warning data is available to competitors elsewhere. [8]

Not only did manufacturers concede that some of the early warning data is not exempt; *they urged NHTSA to adopt only presumptions, not categorical determinations,* under Exemption 4. Some manufacturers sought exemption of all early warning data under Exemption 3. But failing that, when arguing under Exemption 4, the manufacturers on which NHTSA relied either did not specify what they sought, asked only for presumptions of confidentiality, or requested that NHTSA not issue any class determinations at all. *See, e.g.*, Comments of the Alliance, August 26, 2003, NHTSA-2002- 12150-29, at 8 ("The 'early warning' submissions regarding the counts of warranty claims, consumer complaints, property damage claims, and field reports should thus be protected

[7]Comments by the Truck Trailer Manufacturers Association similarly suggest that some of the early warning data, or similar data, on truck trailers is currently available from private sources. *See* Comments of the Truck Trailer Manufacturers Association, January 13, 2003, NHTSA-2002-12150-44, at 2 ("Industry production data that is otherwise being collected by independent for-profit firms and private economic forecasting firms is only available to clients of the firms[.]").

[8]Similarly, the agency's rationale for exempting lists of common green tires seems exceedingly thin because the information is likely available elsewhere. The RMA argued in conclusory fashion , and NHTSA agreed, that the release of lists of common green tires "would cause substantial competitive harm since it would allow competitors to know with exact certainty which tires have the same specifications even though they are sold under differing tire brand names." Comments of the RMA, July 1, 2002, NHTSA-02-12150-11, at 8; RMA, Petition for Reconsideration, NHTSA-2002-12150-57, at 8-9 (repeating same). NHTSA neglected its burden of proving that competitors cannot discern the same information by analyzing tires bought in stores. *See Worthington Compressors*, 662 F.2d 45 (reversing summary judgment for further proceedings on question of discoverability of information through reverse engineering).

by a class determinations *presuming* their confidentiality[.]") (emphasis added).[9] NHTSA was apparently aware that industry groups only requested presumptions of confidentiality rather than categorical determinations because it repeated those requests. *See* 68 Fed. Reg. at 44,219 ("Because of the comprehensive nature of the early warning information, the Alliance argued that these submissions 'should . . . be protected by a class determination *presuming* their confidentiality[.]'") (emphasis added). The agency did not explain its decision to go beyond what commenters sought and to exempt *all* information as confidential even though manufacturers conceded some of it was not confidential.

In addition to ignoring manufacturers' acknowledgments, NHTSA failed to respond adequately to Public Citizen's and the consumer groups' specific arguments pointing out that some of the data cannot be confidential or competitively harmful. For example, if a particular system were sold on just one vehicle, eight years ago, the release of early warning data on that system could not possibly cause its manufacturer competitive harm. (And it is exceedingly unlikely that all early warning data regarding that system would still be confidential.) Therefore, the data should be disclosed. When presented with a similar argument, NHTSA did not claim that such circumstances do not exist; nor did it cite any evidence or even respond with an argument. Rather, it dismissed the example by repeating the same conclusory statements that permeate its explanation: "[T]he value of the information is not dependent on whether a specific component has a single or multiple vehicle

[9] *See also* Comments of AIAM, July 2, 2002, NHTSA-2002-12150-18, at 9 ("In addition to establishing a class determination that the TREAD early warning information is *presumptively* confidential, we urge . . .") (emphasis added); Comments of the RMA, July 1, 2002, NHTSA-02-12150-11, at 9 (stating a general conclusion that the early warning data "should be given confidential treatment," then citing boilerplate law without applying it to facts); Comments the Truck Manufacturers Association, July 1, 2002, NHTSA-2002-12150-5, at 4 ("For the reasons discussed above with respect to property damage, warranty claims and consumer complaints, TMA also urges the agency *not* to adopt class determinations concerning these categories of information."); Comments of the Juvenile Products Manufacturers Association, July 1, 2002, NHTSA-2002-12150-21, at 3 ("Accordingly, even if the Agency does not adopt a presumption against disclosure of 'early warning' information generally, it should adopt such a *presumption* with respect to quarterly production volumes and trend data about warranty claims and consumer complaints[.]") (emphasis added).

applications. EWR information provides insight into a broad range of issues, including field experience, customer satisfaction and cost decisions made by companies in paying warranty claims." 69 Fed. Reg. at 21,240. Such statements fall far short of the evidentiary showing necessary to exempt information from FOIA disclosure.

2. The Early Warning Data Will Rarely Be Both Competitively Useful and Confidential.

In addition to NHTSA's failure to prove that the early warning data meets even basic requirements for confidentiality with respect to every make and model, NHTSA fails to account properly for the limited detail in the early warning database. The early warning data is ambiguous in four ways that, when combined, defeat its competitive usefulness. First, in most instances, manufacturers submit only *counts* of incidents—that is, they only submit an aggregate number of consumer complaints, warranty claims, and field reports, without providing detail regarding their contents. Second, the counts concern whole *systems*, not individual parts. *See, e.g.*, 69 Fed. Reg. at 21,421 ("[T]he EWR data simply provide numbers of warranty claims payments, by system or component. They do not identify the particular part or a problem."). Third, because the categories of data are not linked in the early warning database,[10] it is impossible to tell the actual number of problems identified. (For example, if there are 900 consumer complaints, 1200 field reports, and 500 warranty claims about a suspension system, one cannot determine whether some of the counts are duplicative.) Fourth, the data is historical, not prospective, and therefore provides no direct insight into manufacturers' future plans. For these reasons, the early warning data provides very little detail about the business practices of manufacturers, about their cost structures or profitability, or about the economic consequences of the design or use of particular systems. In fact, the record

[10]*See* U.S. Department of Transportation, Office of the Inspector General, Follow-Up Audit of the Office of Defects Investigation, National Highway Traffic Safety Administration, Report No. MH-2004-088, at 3 (Sept. 23, 2002).

does not provide a *single* concrete example of a scenario in which the early warning data would be competitively harmful.

Because the data reveals so few specifics, it will provide significant information about component performance only in the most extreme cases—when a specific system generates very high counts. This has two implications for NHTSA's rules. First, it was improper for NHTSA to base class determinations on harm that will arise relatively infrequently. Second, when the early warning data suggest a potential problem with a system, NHTSA will (one hopes) usually investigate it, and NHTSA's consistent practice is to release most information submitted as part of investigations. *See, e.g.*, 69 Fed. Reg. at 21,417, 21,422, 21,423; Comments of the Alliance, August 26, 2003, NHTSA-2002-12150-29, at 4 ("Congress is therefore presumed to have been aware of NHTSA's longstanding practices of routinely releasing information during the pendency of a specific defect/noncompliance investigation[.]"). Thus, pieces of early warning data have competitive value principally in the instances in which they will likely be disclosed to the public anyway, as part of defect investigations. (It is also likely that in instances of exceptionally poor performance, some of the information may become public as a result of press reports or supplier or manufacturer disclosures.) Meanwhile, NHTSA's rules block the disclosure of data that, because it does not identify problems, is least likely to have competitive value.

When presented with a similar argument, *see* NHTSA-2002-12150-59, at 10-11, NHTSA again responded only with a contradictory conclusion: "As pointed out in the Alliance's comments, these data are competitively sensitive on concerns such as component and system performance and reliability." 69 Fed. Reg. at 21,420 (without citation).

3. NHTSA's Class Determinations Were Permeated by Irrationality and Double Standards.

In addition to its lack of support from anything beyond conclusory statements, NHTSA's

analysis suffers from serious logical flaws.

NHTSA's analysis of production numbers serves as an illustration. To support its determination on production numbers, NHTSA states that although production numbers for light vehicles are "generally available to the public," production numbers have "never been generally available" for non-light vehicles. 68 Fed. Reg. at 44,221; *see also* 69 Fed. Reg. at 21,418. Two obvious problems emerge from this analysis:

First, given that production numbers are "generally available" for light vehicles, one could assume that their release does not cause competitive harm—or that, if it does, such harm would have been documented in the record. But NHTSA failed either to show that the release of production numbers harms light vehicle manufacturers or to explain why their release harms only manufacturers of other types of vehicles. Rather, NHTSA simply relies on those manufacturers' conclusory assertions, adopting them without question or analysis. NHTSA stated: "Harley-Davidson and MIC stated that production numbers by model have never been generally available in the motorcycle industry," 68 Fed. Reg. at 44,221, and "Bluebird . . ., Utilimaster . . ., and the AORC [Automotive Occupant Restraints Council] . . . also each stated that production numbers in their segment of the industry are confidential and likely to lead to substantial competitive harm if released." *Id.*; *see also* 69 Fed. Reg. at 21,418 (citing 68 Fed. Reg. at 44,221). NHTSA also extended those comments far beyond their actual reach. Utilimaster mentioned production numbers only in the context of an Exemption 3 discussion, and only in an expression of general "concern" about the release of three kinds of early warning data. *See* Comments of Utilimaster Corporation, June 24, 2002, NHTSA-2002-12150-3, at 2-3 ("Risk of competitive harm to Utilimaster is especially of concern with respect to production information, warranty claim data and field reports[.]"). Utilimaster only addressed *field reports* specifically and never sought Exemption 4 presumptions or determinations for any early warning data. *See id.* And the AORC merely noted that the release of production

numbers "could" cause competitive harm. It provided no evidence, or even argument, that releasing the data *would likely* cause harm. *See* Comments of the AORC, July 1, 2002, NHTSA-2002-12150-9, at 3 ("While vehicle production information is generally public information, this is not the case for supplier production information. Making this information public *could* impact negatively the supplier's competitive position.") (emphasis added).

Second, NHTSA's conclusion that production numbers are *generally* not available in some industries suggests that they sometimes *are* available. If they are sometimes available, then they are sometimes nonconfidential and, in those instances, they must be released.

Similarly, NHTSA concedes that the "nature, quality and quantity of field reports vary significantly from company to company." 68 Fed. Reg. at 44,223; *accord* 69 Fed. Reg. at 21,422. But the agency does not explain why such wide variation does not result in at least *some* field reports being subject to FOIA disclosure. And although NHTSA found that death and injury reports are not competitively harmful because they are "historical," 68 Fed. Reg. at 44,222; 69 Fed. Reg. at 21,414, the agency also characterized field reports as "historical," 68 Fed. Reg. at 44,223, but did not explain why the historical nature of field reports does not render them harmless.

Indeed, NHTSA's analysis was permeated by irrationality and double standards. For example, when analyzing competitive harm from disclosure, NHTSA insisted on considering all the early warning data together, as a "comprehensive" compendium of information. *See* 69 Fed. Reg. at 21,414, 21,417, 21,418, 21,419. However, when considering the data's value to the public, NHTSA considered each piece in isolation to minimize its value. *See* 69 Fed. Reg. at 21,421 ("*Standing alone*, the EWR warranty data simply provide numbers of warranty claims payments.") (emphasis added); 21,422 ("*Standing alone*, the EWR field report numbers simply indicate that there was a reported problem, by system, or component.") (emphasis added); 21,423 ("*Standing alone*, [the consumer complaint data] simply indicate consumer dissatisfaction or perception of a potential

or actual defect, by system or component.") (emphasis added). NHTSA did not explain why manufacturers competing with other companies would view the data collectively but members of the public monitoring NHTSA would only view the data piecemeal.

Similarly, NHTSA consistently shifted the burden of persuasion to those advocating disclosure or dismissed their comments as too general or too narrow. *See, e.g.*, 69 Fed. Reg. at 21,418 ("PCLG's petition neither addresses the record nor provides factual or expert rebuttal."); *id*. at 21,419 ("PCLG attempts to make a case in favor of disclosure by submitting information on the agency's determination that certain information supplied by a vehicle manufacturer within the context of a specific investigation by ODI was not confidential. That sample submission, however, does not involve or represent EWR information."); *id*. at 21,421 ("PCLG offers no suggestions on how these or other EWR data could be segregated to avoid the concerns."); *id*. at 21,422 ("Although it generally questions the sufficiency of the record, PCLG does not address this or other record information in its petition."); *id*. ("In general, PCLG's petition mentions field reports along with warranty claims, without a particular discussion of field reports."); *id*. at 21,423 ("For example, the Alliance *noted the value of EWR data*, including complaints, in revealing customer satisfaction and manufacturer cost information. PCLG's petition provides *no factual rebuttal*.") (emphasis added); *id*. ("In general, PCLG's petition mentions consumer complaints along with warranty claims, without a particular discussion of consumer complaints.").

By contrast, when considering the comments of manufacturers, NHTSA consistently extrapolated wildly from narrow claims or adopted conclusory generalizations unsupported by evidence. For example, as discussed above, the agency relied blindly on TIA's general speculation about impairment. And it apparently considered AIAM's, Workhorse's, and Utilimaster's comments relevant to all early warning data even though they addressed only field reports. *See id*. Likewise, NHTSA extrapolated industry-wide concerns out of Cooper Tire's comments, even though Cooper's

argument, by its own terms, applied primarily to small companies like Cooper rather than to the whole tire industry.[11]

Similarly, NHTSA accepted at face value General Motors' dubious and conclusory claim that mere counts of some warranty claims provide an index of a manufacturer's costs. *See* Fed. Reg. at 44,222 (citing Comments of General Motors, June 28, 2002, NHTSA-2002-12150-12 [at 2]). Manufacturers incur massive costs other than the cost of paying warranty claims. Moreover, even if warranty claims were manufacturers' sole cost, the early warning data only contains *counts* of warranty claims without specific dollar values and only requires the counts for *some systems*. NHTSA does not explain how such data could provide a comprehensive index of a manufacturer's costs. NHTSA also relied on General Motors' comments in determining that *all* warranty claims data is confidential because its release would give competitors free insight into others' experience with particular components, *see* 68 Fed. Reg. at 44,222, even though General Motors' argument, by its own terms, applies only when manufacturers purchase *whole systems* that match NHTSA's early warning system codes. *See* Comments of General Motors, June 28, 2002, NHTSA-2002-12150-12, at 2 ("Increasingly, vehicle manufacturers purchase entire systems from suppliers . . . . With disclosure of 'early warning' warranty data, vehicle manufacturing competitors would gain information not otherwise available to them about the warranty claims experience of systems made by various potential suppliers[.]"). NHTSA did not inquire into how often manufacturers buy whole

[11] *Compare* 68 Fed. Reg. at 21,417 n.17 ("A report submitted by Professor Michael D. Bradley that accompanied Cooper Tire's comments . . . observes that the disclosure of [lists of common green tires] would be equivalent to the release of a tire company's business plan.") *with* Attachment 1 to Comments of Cooper Tire, at 1, July 1, 2002, NHTSA-2002-12150-17 ("[W]e show that smaller companies like Cooper are particularly at risk.") *and id.* at 5 ("It would be much easier for one of the three giant firms [Goodyear, Michelin, and Bridgestone/Firestone] to analyze Cooper's data and determine a responsive marketing plan than it would be for Cooper to analyze one of the three major producers' data and construct a similar plan.") *and id*. at 7 ("Release of Cooper's green tire groups and the identification of the green tire source for each finished tire would provide a complete and comprehensive road map to *Cooper's* production and marketing strategies. Without exaggeration, release of this green tire information would essentially be equivalent to release of *Cooper's* business plan for its tire business.") (emphasis added).

systems that match the early warning codes; nor did it address how the early warning warranty data causes competitive harm when manufacturers do not purchase whole systems.

4. NHTSA Failed to Provide Evidence of Harm Even Under Its Novel Theories That Consumer Misunderstandings and Cross-Company Comparisons Can Constitute Competitive Harm.

As discussed above, NHTSA was mistaken to deem the potential misunderstanding of early warning data by consumers and the potential misuse of the data by competitors relevant to the competitive harm inquiry. But even if those considerations were legally relevant, NHTSA has failed to show that misunderstandings will, in fact, occur and cause harm. For example, NHTSA asserted that consumers may not know that different manufacturers offer different warranty periods and that some manufacturers vary in their generosity in paying warranty claims when they believe they are not required to do so. According to NHTSA, consumers therefore may not realize that warranty claim information in the early warning database cannot be directly compared across different manufacturers. But NHTSA cites no evidence that consumers will be confused by the early warning information or that competitors will use it to make misleading claims. Instead, it relies exclusively on speculation. 68 Fed. Reg. at 44,222 ("While manufacturers are likely to explore the practices and policies of their competitors when reviewing any publicly available warranty claims information, the public is more likely simply to rely on generic cross-company comparisons.") (no citation); 69 Fed. Reg. at 21,418-19.

Moreover, NHTSA ignores strong arguments that the public will not be confused. As consumer groups explained in their petition for reconsideration, consumers currently rely on many books, magazines, and user-friendly databases with detailed analyses specifically designed for laypersons. *See* NHTSA-2002-12150-59, at 7-8. NHTSA cites no evidence that consumers will abandon those publications in favor of the raw early warning data. More likely, if consumers consider early warning data at all, it will be through the filter of reliable expert sources such as

consumer safety groups or, at the least, in context of several other sources of information.

When presented with this argument, NHTSA only responded with respect to warranty claims that the agency "do[es] not accept [the] theory" because "public sources of information do not remotely resemble the EWR warranty data." 69 Fed. Reg. at 21,420. NHTSA did not explain why the differences between public sources of information and the early warning data will lead the public to rely exclusively on, or misunderstand, the latter. Nor did it cite any evidence to support its refusal to "accept" the consumer groups' "theory." Again, NHTSA's speculation and conclusory assertions fall far short of satisfying the agency's burden to prove the applicability of a FOIA exemption.

5. NHTSA Failed to Show That the Data Is Not Segregable and That Exemption of Some Data Will Not Render Other Data Harmless.

NHTSA did not seriously consider whether it could segregate exempt and nonexempt information as required by law. *See Vaughn*, 484 F.2d at 826-29. The agency's final rulemaking notice did not mention segregation or redaction at all. In response to the consumer groups' petition for reconsideration, the agency only stated:

> We do not believe it is possible to further segregate the data within each category, as each category contains from each manufacturer the same type of data presented in a required format. The early warning database is fundamentally different than individual submissions (such has those presented during defect investigations) in which confidential data is routinely redacted and the remainder of the submission is placed in the public file.

69 Fed. Reg. at 21,417. Then, it unlawfully shifted the burden on Public Citizen to suggest ways of segregating the nonexempt portions of the data: "PCLG offers no suggestions on how these or other EWR data could be segregated to avoid the concerns we identified in the preamble to the final rule and above." *Id*. at 21,421.

From NHTSA's posturing, one would never guess how easily the agency could redact or segregate confidential portions of the early warning data: In fact, manufacturers submit much of the early warning data in spreadsheet form. *See, e.g.*, Office of Defects Investigation, Early Warning

Reporting Downloads, http://www-odi.nhtsa.dot.gov/ewr/#downloads. If portions of a particular spreadsheet were exempt from disclosure, NHTSA could easily delete the appropriate cells, rows, or columns.

NHTSA also failed to consider whether exempting one type of early warning data could affect the exemptions for other types. Even if some categories of early warning data were competitively harmful when released with other data, they might lose their competitive value if other data were exempt from disclosure. For example, production numbers provide a denominator to help analyze the other categories of data. (It is more useful to know that a manufacturer paid 100 warranty claims on a system and that such 1000 systems were produced (10% of the systems have had problems) than it is to learn only the number of warranty claims paid.) By ruling production numbers confidential for several types of manufacturers, NHTSA has rendered the remainder of information from those manufacturers far less competitively valuable. In other words, if the agency is going to rely on a "mosaic" theory to explain why it cannot release *all* the information, it must explain why it cannot provide *some* of the information when other parts of the mosaic are withheld. NHTSA failed to do so.

V. NHTSA'S EXEMPTION FOR VEHICLE IDENTIFICATION NUMBERS HAS NO BASIS IN LAW OR FACT.

Finally, NHTSA's determination that the last six digits of vehicle identification numbers (VINs) included with fatality and injury reports are categorically exempt under FOIA Exemption 6 has no basis in law or fact. Exemption 6 applies only to "personnel and medical files and similar files." 5 U.S.C. § 552(b)(6). Although the case law authorizes exemptions for individual consumers' names and addresses in some circumstances, NHTSA cited no case authorizing the withholding of *nonpersonal* data merely because personal information can arguably be derived from it through further research. Moreover, NHTSA failed to demonstrate that the identities of

individuals injured or killed as a result of auto safety defects will always be confidential, particularly given intense media interest in such incidents, and it failed to demonstrate that such people desire to keep their identities confidential. Finally, the public had no notice or opportunity to comment on NHTSA's VIN determination because NHTSA produced it without warning in response to a petition for reconsideration of the final Appendix C rules.

CONCLUSION

In sum, NHTSA's categorical exemption rules are permeated with illegality. The agency lacked authority to issue them, violated APA rulemaking procedures when it issued them, and utterly disregarded FOIA's substantive requirements in its wholesale exemption of information.

For the above reasons, this court should vacate the Appendix C rules in their entirety.

Respectfully submitted,

/S/

Scott L. Nelson, DC Bar No. 413548
David Arkush, DC Bar No. 490385
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Plaintiff
Public Citizen, Inc.

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